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In The
Supreme Court of the United States
October Term, 1998

JOHN HENRY ADAMS.
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

Petition For A Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

I.

When reviewing the propriety of a trial court's decision to conduct an evidentiary hearing on the constitutionality of a search and seizure, is the standard to be utilized by the appellate court of the deferential abuse of discretion?

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STATUTES

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No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY ADAMS, PETITIONER

-vs-

STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

NOW COMES the Petitioner, JOHN HENRY ADAMS, by his attorney, ARTHUR JAY WEISS, and respectfully Petitions this Honorable Court for a Writ of Certiorari to review the Judgment of Michigan Supreme Court.

OPINIONS BELOW

The Orders of the Michigan Court of Appeals and Michigan Supreme Court (Appendix 1 a) are not reported.

JURISDICTION

The Order of the Michigan Supreme Court was entered on or about March 30, 1999. This Petition for Writ of Certiorari is being filed within ninety (90) days of said date as required by Rule 13.1 of the Supreme Court Rules. The Jurisdiction of this Court is invoked pursuant to 28 USC § 1254 (1)

CONSTITUTIONAL PROVISION INVOLVED

The fourth Amendment provides, in pertinent part, "no Warrant shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things being searched."

STATEMENT

1. The Petitioner, JOHN HENRY ADAMS, is accused herein in an one (1) count information with possession with intent to distribute heroin, MCLA 33.7401 (2)(a)(ii). Although the requested--and trial court approved--evidentiary hearing has yet to be conducted, there is understandably at this juncture a mere paucity of salient facts.

2. However, your Petitioner is informed and verily believes--premised upon the testimony adduced during the

preliminary examination conducted below--the instant prosecution is premised[1] upon the fruits of a search warrant executed on or about March 20 1997 at 14540 Puritan in the City of Detroit. For the reasons set forth infra, Mr Adams respectfully submits the pertinent search warrant and supporting affidavit are constitutionally defective; hence, the fruits thereof must be suppressed. See generally, People v Sloan, 206 Mich App 484, 487, 522 NW 2d 684 (1994), aff'd, 450 Mich 160, 538 NW 2d 380 (1995).

3. Although the trial court initially granted Petitioner's Motion for an Evidentiary Hearing on the propriety of said search warrant and while denying our request for production of the informant, mandated the production of a "unwitting". The Court of Appeals reversed as to this later facet of the trial court's order. On or about December 10, 1998, the appellate court denied your Petitioner's Motion for Reconsideration and his Application for Leave to Appeal was denied by the Michigan Supreme Court on or about March 30, 1999.

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[1] Preliminary Examination Transcript will be referred to as "PET." Additional factual recitations emanating from this examination are contained in Reasons for Granting the Petition, infra.

REASONS FOR GRANTING PETITION

I. WHEN REVIEWING THE PROPRIETY OF A TRIAL COURT'S DECISION TO CONDUCT AN EVIDENTIARY HEARING ON THE CONSTITUTIONALITY OF A SEARCH AND SEIZURE, THE STANDARD TO BE UTILIZED BY AN APPELLATE COURT IS THE DEFERENTIAL ABUSE OF DISCRETION.

A.

1. The prosecution below concedes the appropriate standard of review in these premises in an abuse of discretion (Application, Page 9). People v Poindexter, 90 Mich App 599, 608, 308 NW 2d 664 (1981). The Michigan Supreme Court in People v Charles O Williams, 386 Mich 565, 573, 194 NW 2d 337 (1972), defined the standard required for an appellate court to opine is an "abuse of discretion."

> Where...the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result

> must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. (Emphasis added).

2. It is the position of JOHN HENRY ADAMS, the prosecution has not established the Honorable Robert L Evans abused his discretion is mandating the occurrence of the requested evidentiary hearing below. Hence, the decision of June 17 1998 should be revisited and reversed.

B.

1. In determining the propriety of the complained of search warrant, we must initially confine our inquiry to "only consider the information in the affidavit in determining whether or not probable cause exist[ed] to issue [the] search warrant." People v Goins, 164 Mich App 559, 560, 417 NW 2d 499 (1987). In the appeal at bar, inasmuch as the justification for the search warrant is the information purportedly obtained from an informant, the following criteria must be strictly observed.

> [T]he affidavit in support [of the search warrant] must: (1) contain affirmative allegations that the informant spoke with personal knowledge; (2) set forth facts from which one can conclude that the informant is

> credible; and (3) demonstrate that the information is reliable. People v Sherbine, 421 Mich 502, 509-510, 364 NW 2d 658 (1984); MCLA 780.653. People v Goins, supra, 164 Mich App at 561.

2. However, the pertinent search warrant refers to both an "unwitting" and an "informant," the problems are compounded. Initially, JOHN HENRY ADAMS, would note the affidavit, while reciting information from the informant, does not advise the magistrate--nor this Court nor your Petitioner--as to how the informant acquired the specific information: was it on the basis of first-hand visually and/or oral sensatory acquisition or merely advisement of same by the "unwitting." Presumably the "unwitting" was employed because neither the informant nor the authorities could approach Mr Adams in a manner which would have produced the desired effects (Application, page 4).

3. Unfortunately, the affidavit is completely barren of any information whatsoever as to either the reliability of credibility of this "unwitting"--and "rightfully" so. Similarly, what information was imparted by the informant was not articulated in terms of acquisition, i.e, how the informant "acquired" same. These two (2) defects--absence

of "unwitting" reliability[2] and failure to identify methodology of acquisition of information--renders the search warrant herein[3] unconstitutionally defective. See generally, People v Tanis, 153 Mich App 806, 808-813, 396 NW 2d 544 (1986).[4]

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[2]During the preliminary examination, the officer testified he had no previous experience with the "unwitting" and could provide no information as to this individual's credibility or reliability (PET 21); in fact, the officer had no personal knowledge as to what the "unwitting" may have received from your Petitioner (PET 36), nor did the officer ever meet the "unwitting" or search this individual prior to purportedly meeting JOHN HENRY ADAMS (PET 24).

[3]It is not per se unconstitutional for information in an affidavit to "pass through two (2) links"; however, as to each unidentified informant "link", that person's credibility and reliability must be demonstrated. People v Osborn, 122 Mich App 63, 68-70, 329 NW 2d 533 (1982).

[4]Michigan has declined to adopt the "good faith" exception to the exclusionary rule. People v Bloyd, 416 Mich 538, 556, 331 NW 2d 447 (1982); People v David, 119 Mich App 289, 297-298, 326 NW 2d 485 (1982), lv den 417 Mich 858 (1983).

C.

1. The affidavit merely describes--at "best"--one (1) acquisition of controlled substance without any indication of "on-going" activity and/or a pattern of protracted violations. Consequently, inasmuch as the warrant was executed at least twenty-four (24) hours after the event described in the stated affidavit, the information contained therein is constitutionally "stale" due to an absence of demonstrating the controlled substance sought would in fact be present at the time of execution. People v Stumpf, 196 Mich App 218, 226, 492 NW 2d 795 (1992), lv den 422 Mich 923, 503 NW 2d 899 (1993), cert denied, 510 US 1042, 114 S Ct 686, 126 L Ed 2d 654 (1994).

D.

1. The judiciary's meticulous adherence to mandating an affidavit specifically recite how an informant acquired the information contained therein is both evident and consistent. See, People v Rosborough, 387 Mich 183, 198-199, 195 NW 2d 255 (1972); People v Brooks, 101 Mich App 416, 419-420, 300 NW 2d 582 (1980), lv den 411 Mich 940 (1981). As previously detailed herein, see Argument I (B), supra, the complained of affidavit is so poorly drafted one cannot ascertain where the "unwitting's" information concludes and the "informant's" knowledge commences.

2. In addition, not only does JOHN HENRY ADAMS dispute the existence of the purported "purchase" described in the affidavit, it is evident both the "unwitting" and the informant are crucial to a fair ascertainment as to precisely what--if anything--transpired herein, especially given the questionable validity and/or accuracy of the information contained in the pertinent affidavit, see, Argument I (E), infra. Consequently, it is manifest the identity of this "unwitting" and the informant, if in fact they exist, be disclosed. People v Poindexter, supra, 90 Mich App at 606-608.

3. Where, as in the instant prosecution, the production of the informant is necessary and "essential to a fair determination of a cause," Roviaro v United States, 353 US 53, 77 S Ct 623, 1 L Ed 2d 639 (1957); People v Stander, 73 Mich App 617, 251 NW 2d 258 (1976), the identity of same must be disclosed.

> [Roviaro and Stander] do require disclosure of an informant's identity where disclosure is "essential to a fair determination of a cause." In the instant cause, a fair determination of the cause includes consideration of the validity of the search warrant. And if the defendant's allegations regarding the lack of an informant are true, they strike at the very heart of the affidavit relied on in this case and bring into question the validity of the warrant. Consequently,

> we conclude that a trial judge may exercise his discretion to require production of an informant who allegedly supplied police with information which led to the issuance of a search warrant where a defendant claims that the informant does not exist. People v Poindexter, supra, 90 Mich App 608 (Footnote omitted) (Emphasis added).

4. Moreover, even assuming, arguendo, an informant does in fact exist, then it would appear the informant was in fact a participate in the activities alleged herein; hence, the identities of both the "unwitting" and "informant" must nonetheless be disclosed.

> Generally, the people are not required to disclose the identity of confidential informants. People v Sammons, 191 Mich App 351, 368, 478 NW 2d 901 (1991). However, "[W]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id, quoting Roviaro v United States, 353 US 53, 60-61, 77 S Ct 623, 1 L Ed 2d 639 (1957). Similarly, where the informant was a participant in the underlying transaction rather then a mere supplier of information, he is a res gestae witness, and the privilege does not apply. Sammons, supra at 368. In such cases, the action may be dismissed for failure to

produce identifying information. Id. People v Cadle, 204 Mich App 646, 650, 516 NW 2d 520 (1994) (Emphasis added).

5. Since People v Cadle, supra, 204 Mich App at 650, is now "controlling authority," Administrative Order 1994-4, it is apparent the purported informant's identity--and that of the "unwitting"--must be disclosed at bar.

E.

1. The prosecution contended below (Memorandum, page 2)--and re-asserted before the Court of Appeals (Application, pages 11-13)--"the Defendant has not made any specific allegations of deliberate falsehood or reckless disregard for the truth." Perhaps Respondent has not read our pleadings submitted herein.

2. During the course of the pertinent preliminary examination, the witness/affiant admitted a critical observation detailed in the affidavit in support of search warrant (Page 3) did not transpire (PET 23). More specifically, in the affidavit, the affiant related he observed JOHN HENRY ADAMS "go into the office area and retrieve a small object" (Page 3). Yet during his testimony at the examination, affiant was required to acknowledge he could not "see" what, if anything, occurred inside the structure (PET 23).

3. This discrepancy is crucial! Perhaps the witness' purported observations of your Petitioner would give rise to probable cause to arrest, see, United States v Thomas, 551 F 2d 347, 348 (DC Cir 1976)(probable cause to arrest established when experienced policeman observed exchange of tinfoil packet for currency), but without the nexus of controlled substances being inside the structure--hence, the necessity of an observation of obtaining "something" inside the building--there is an absence of probable cause to search, see, United States v Manufacturers Nat'l Bank, 536 F 2d 699, 703 (6th Cir 1976) ("Once it is established that probable cause exists to believe a...crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of that crime."). Accord: United States v Melvin, 596 F 2d 492 (1st Cir 1979)(insufficient evidence to arrest defendant in connection with bombing did not affect the probable cause necessary to believe that fruits, instrumentality's or evidence of the crime might be secreted in the defendant's home).

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is

sought.[5]

* * *

"Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe'--sometimes stated 'probable cause to believe'--that a felony has been committed by the person to be arrested. Although it would appear that the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions

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[5] The same view has been expressed by those who have given close attention to the Fourth Amendment. It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities as to somewhat different facts and circumstances--a point which is seldom made explicit in the appellate cases.

Zurcher v Stanford Daily, 436 US 547, 556-557, 98 S Ct 1970, 56 L Ed 2d 525 (1978) (Emphasis added).

themselves are not identical.

"In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." Comment, 28 U Chi L Rev 664, 687 (1961) (footnotes omitted).

4. Moreover, while the affidavit in support of the complained of search warrant alleges JOHN HENRY ADAMS was the "owner" of the pertinent premises (Page 2), the testimony and exhibits presented during the preliminary examination quite clearly demonstrate the lack of ownership interest in these premises (PET 15-16; Exhibit #1)--a fact the prosecution apparently now concedes (Application, page 5). Again, the affiant's attempt to establish a "nexus" or relationship between Mr Adams and the structure to be searched has been established to be false!

5. Furthermore, by removing these complained of erroneous allegations from the affidavit, it is evident there is no probable cause to search the pertinent structure due to an absence of any relationship between the building and your Petitioner, as well as no demonstration any evidence of the purported criminal activity will be discovered therein. See, United States v Morris, 477 F 2d 657 (5th Cir 1973); People v Price, 86 Mich App 641, 644-645, 273 NW 2d 97 (1978); People v Broilo, 58 Mich App 547, 551-552, 228 NW 2d 456 5(1975). Accordingly, there surely can be serious question JOHN HENRY ADAMS has satisfied the requirements articulated by the United States Supreme Court in Franks v Delaware, 438 US 154, 171-

172, 98 S Ct 2674, 57 L Ed 2d 667 (1978), as utilized by the Michigan Court of Appeals in People v Poindexter, supra, 90 Mich App at 604-605. See also, People v Williams, 212 Mich App 607, 538 NW 2d 89 (1995); People v Stumpf, 196 Mich App 218, 224, 492 NW 2d 795 (1992), lv den, 442 Mich 923, 503 NW 2d 899 (1993), cert denied, 510 US 1042, 114 S Ct 686, 126 L Ed 2d 654 (1994).

6. In light of the foregoing, it is obvious the prosecution's assertion "the defendant has not made any specific allegations of deliberate falsehood or reckless disregard for the truth"[6] (Memorandum, page 2) is as "accurate" as the complained of affidavit in support of search warrant!

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[6] Respondent alleges "the judge ruled that there were no apparent inconsistencies between statements in the affidavit for the search warrant and the testimony of the affiant at the preliminary examination" (Application, page 13). However, such an assertion is incorrect, for the court merely opined "[a]pparent inconsistencies between the statements in the affidavit...and the testimony...at the preliminary examination are not sufficient to persuade this court" the "threshold requirements" of Poindexter were satisfied (Opinion and Order). Your Petitioner would merely comment the conducting of the requested evidentiary hearing would further establish the affiant's complicity in the machinations alleged herein.

F.

1. The prosecution cited People v Poindexter, supra, as controlling "whenever a Defendant seeks to have a Confidential Informant produced." (Memorandum, page 1) (Emphasis added). Although JOHN HENRY ADAMS will respond to the applicability of the Poindexter analysis infra, it is significant to note your Petitioner desires in this cause to have both the confidential informant and the "unwitting" produced. While admittedly the "informer's privilege" may apply to the analysis when a request for the informant is presented, see, e g, Roviaro v United States, supra, 353 US at 63; People v Stander, supra, 73 Mich App at 621-623 ("The purpose of the 'informant's privilege', as it is sometimes called, is to encourage citizens to communicate information regarding law enforcement agencies by preserving their anonymity"); however, the "unwitting" who, by definition, "did not know what was occurring" (PET 7), does not have--or require--a similar prophylactic, Roviaro v United States, supra, 353 US at 63; People v Stander, supra, 73 Mich App at 621-623. It appears the prosecution concedes the accuracy of this analysis (Application, p. 11).

2. Nonetheless, they, without explanation or amplification, rotely contend disclosure of the "unwitting" will somehow compromise the identity of the informant (Application, pages 7, 11). Your Petitioner, quite frankly,

cannot comprehend this logic. If the "un-witting" is produced, undersigned counsel, as an attorney and officer of the Court, will not transcend the Opinion and Order of Judge Evans by inquiring as to the identity of the informant. As such, the "informer's privilege" will remain sacrosanct and Mr Adams can attempt to present a defense to the sever allegations confronting him.

3. No where--either below or their Application before the Court of Appeals -- did the prosecution identify any relevant case law which would protect either the identity and/or production of an "unwitting." This is for the simple, but obvious, reason no such case law exists. As will be evident infra, Argument I (G), the constitutional concept of "fundamental fairness" mandates, at an absolute minimum, the "unwitting" be produced herein. See, Roviaro v United States, supra, 353 US at 60-62; People v Stander, supra, 73 Mich App at 621-623.

G.

1. The prosecution further complains since the "incident" of March 19th is not charged--and presumably will not be utilized by them during their case-in-chief--there is no necessity to present the informant because he was not present during the "charged incident" of March 20th (Application, pages 10-11). With all due respect, such a

contention is, at best, overly-simplistic, and at worse, misleading.

2. Even assuming, arguendo, the prosecution's argument the informant was not res gestae, this does not conclude the inquiry, for no Court this writer is aware of has opined such a limitation. For example, the United States Supreme Court in Roviaro v United States, supra, 353 US at 60-61 [cited by the Michigan Court of Appeals in People v Poindexter, supra, 90 Mich App at 606-607], has opined disclosure of an informant is mandated pursuant to the notion of "fundamental fairness" which is present whenever "the disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause..."

3. It is exceedingly clear this cause mandates production of the informant--or at an absolute minimum, the "unwitting"--to establish JOHN HENRY ADAMS did not "meet" with the informant and the "unwitting," go into the structure, retrieve a small object and hand same to the "unwitting." Not only is the crux of the purported justification for the search warrant--hence the "essential to a fair determination of a cause" requirement--but also as relates to the "heart" of the prosecution's case. See,

Roviaro v United States, supra, 353 US at 60-61; People v Poindexter, supra, 90 Mich App at 606-607.

H.

1. Although the prosecution alleges JOHN HENRY ADAMS "is not charged with [the March 19th alleged] delivery..." (Application, page 11), your Respondent notes they do not promise this Court they will not utilize evidence of this alleged transaction. This is significant, for there is no guarantee or assurance testimony of the purported "incident" will not be employed pursuant to MRE 404 (b).

2. More importantly, in the absence of an ownership in the pertinent premises (PET 15-16; Exhibit #1), the prosecution at the preliminary examination (PET 33-66), was required to resort to "similarities" between the "color" of the heroin secured on March 19th and the substance seized on March 20th, as well as similarities in packaging materials (PET 33-34). Incredibly, the Appellant proffered the same arguments in its Application (Page 7).

3. This alleged "necessity of comparison" will become increasingly necessary at trial in light of the fact several individuals were present at the time of the "search warrant execution" but only JOHN HENRY ADAMS was arrested and charged (PET 31-32); query how the decisions of this

Court in People v Davenport, 39 Mich App 252, 255-259, 197 NW 2d 521 (1972); People v Summers, 68 Mich App 571, 580, 243 NW 2d 689 (1976), rev'd on other grounds, 452 US 692, 101 S Ct 2587, 69 L Ed 2d 340 (1981), will impact upon the prosecution's case without evidence of March 19th!

4. Consequently, it becomes rather apparent the March 19th "incident" does in fact become a critical portion of the prosecution's case against your Appellee. Hence, any prosecutorial attempts to distinguish the instant cause from the factual presentation of People v Cadle, supra, are "distinctions without differences." After all, it must be remembered the phrase "res gestae" is generally defined broadly to include "[t]the whole of the transaction under investigation and every part of it," Black's Law Dictionary 1469 (4th ed 1968), and not the narrow construction provided by the prosecution without citation (Application, pages 11-12).

5. Moreover, examination of the opinion published by the Court of Appeals reveals this appellate court did not, as claimed by the prosecution, limit production to situations where the informant was a portion of the res gestae (as impermissibly defined by them, Memorandum, page 2), but with citation to People v Sammons, 191 Mich App 351, 368, 478 NW 2d 901 (1991), specifically and

unequivocally opined disclosure is to transpire when "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause...." People v Cadle, supra, 204 Mich App at 650 (also quoting Roviaro v United States, supra, 353 US at 60-61).

6. In light of the analysis provided herein by JOHN HENRY ADAMS, it must be apparent the disclosure requested herein should transpire since the same is "relevant and helpful to the defense...[and] is essential to a fair determination of [this] cause...." Id.

I.

1. If the prosecution's logic pertaining to "fearful disclosure" of the informant's identity would be sufficient to "carry-the-day" (Application, pages 7, 11), query how even the affiant could ever be called to the witness stand for concern the affiant might somehow compromise the identity of the informant. Under such a prosecutorial scenario, no inquiries could realistically transpire .

2 Consequently, those accused, such as JOHN HENRY ADAMS, would effectively be denied their constitutional rights to present a defense. See, Crane v Kentucky, 476 US 683, 691-692, 106 S Ct 2142, 90 L Ed 2d 636 (1986); Chambers v Mississippi, 410 US 284, 302, 93 S Ct 1038, 35 L Ed 2d 297 (1983). See also, Taylor v

Illinois, 484 US 400, 409, 108 S Ct 646, 98 L Ed 2d 798 (1988) ; Washington v Texas, 388 US 14, 19, 87 S Ct 1920, 18 L Ed 2d 1019 (1967).

J.

1. The prosecution below, and apparently before this Honorable Court (Application, page 13), questioned the propriety of an evidentiary hearing herein. Because of the inapposite nature of the case law they profess to rely upon and confusion and/or "fusion" of legal issues contained herein, it is respect-fully submitted an appropriate analysis will reveal an evidentiary hearing in these premises is mandated and reasonable.

K.

1. Despite the factual presentation set forth supra, the prosecution appeared to contend your Petitioner did not present sufficient facts to warrant an evidentiary hearing herein. Significantly, however, they have been unable to supply either the lower Court or this appellate Court with any authority for such a proposition. Nonetheless, this writer has researched this particular issue and could not ascertain the existence of any applicable published case decisions which support such a fanciful contention.

L.

1. As to the contention a transcript of the preliminary examination will suffice at bar, the fallacy of same has

been a stable of our jurisprudence for well-over a decade. In People v Talley, supra, 410 Mich at 390 n 3, the Michigan Supreme Court clearly and unequivocally condemned the specific practice the prosecution desires the Court to employ.

> We recognize that it has often been the practice of our trial courts to rely exclusively on preliminary examination transcripts in ruling on motions to suppress. This, of course, meant that appellate courts were also limited to the preliminary examination transcripts in passing on search and seizure issues since testimony later taken on the trial, amplifying the circumstances of the search or seizure, cannot be considered. People v Miller, 245 Mich 115, 117, 222 NW 2d 151 (1928). See e g, People v Zeigler, 358 Mich 355, 359, 100 NW 2d 456 (1960); People v Kaigler, 358 Mich 281, 297-299, 118 NW 2d 406 (1962); People v Miller, 26 Mich App 665, 667, 182 NW 2d 772 (1970). Today we specifically prohibit the practice in order to promote a more through exposition of the events surrounding a contested search or seizure. This, we hope, will aid the trial courts as well as the appellate courts in drawing the difficult line between the constitutionally permissible search or seizure and the constitutionally impermissible one. (Emphasis added).

2. Moreover, in People v Futrell, 125 Mich App 568, 572, 336 NW 2d 834 (1983), the Michigan Court of Appeals, with citation to Talley, held even a stipulated set of facts may not be able to prevent the Court from conducting an evidentiary hearing for "[t]he facts stipulated to might still, however, be insufficiently detailed to inform the court of all that is constitutionally significant."

3. Lest there be any doubt as to the propriety of your Petitioner's position in this cause, we would respectfully direct the Court's attention to People v Whittaker, 187 Mich App 122, 466 NW 2d 364 (1991). In Whittaker, the trial court, inter alia, refused to conduct the requested evidentiary hearing, rendering a decision on the suppression motion by merely referring to the preliminary examination transcript. The Court of Appeals reversed.

> In Talley, supra, p 382, our Supreme Court specifically disapproved of the practice of relying exclusively on preliminary examination transcripts in conducting suppression hearings. Our Supreme Court further stated:
>
> Even had the trial court chosen to give express consideration to the constitutionality of the seizure, it could not properly have decided whether or not the evidence should have been suppressed without a full evidentiary hearing--listening to witnesses and judging other evidence--to determine

whether or not the seizing officer had probable cause to seize the evidence. Since the trial court did not have such a full evidentiary hearing it would have no way of knowing whether the facts in the case authorized or did not authorize the officer to seize the evidence. For the Court of Appeals to presume to rule on the merits in such an absence of proper procedure requires the holding of a full evidentiary hearing and any attempt to rule on such a motion on the basis of a preliminary examination transcript alone is inadequate and erroneous.

Since a trial court has not yet had an opportunity to examine the totality of the circumstances surrounding the contested seizure with an eye toward determining the existence or absence of probable cause, we remand for an evidentiary hearing on defendant's motion to suppress to help insure the constitutionally correct resolution of this issue.

Talley is still good law. While defendant filed a notice of hearing with respect to his motions to quash and to suppress the evidence, the record does not indicate that such a hearing was ever held. Accordingly, the circuit court erred in deciding the motion to suppress solely on the basis of the preliminary examination transcript. We there-fore remand this case

> to the circuit court for an evidentiary hearing on defendant's motion to suppress. Id at 129-130. Accord: People v Bloyd, 416 Mich 538, 542 n 2, 331 NW 2d 447 (1982); People v Venegas, 411 Mich 906 (1981).

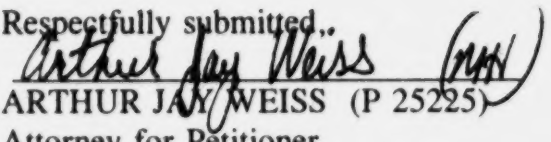
4. Regardless of how this Court ultimately opines on the production of the informant or /unwitting," JOHN HENRY ADAMS respectfully submits the requested hearing must be conducted--even if neither the informant or the "unwitting" is produced. See, People v Whittaker, supra, 187 Mich App at 129-130; People v Wiejecha, 14 Mich App 486, 165 NW 2d 642 (1968).

> Talley is still good law. While a defendant filed a notice of hearing with respect to his motions to quash and to suppress the evidence, the record does not indicate that such a hearing was ever held. Accordingly, the circuit court erred in deciding the motion to suppress solely on the basis of the preliminary examination transcript. We therefore remand this case to the circuit court for an evidentiary hearing on defendant's motion to suppress. People v Whittaker, supra, 187 Mich App at 129-130. (Emphasis added).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



ARTHUR JAY WEISS (P 25225)
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Dated: June 28, 1999

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Court of Appeals, State of Michigan

ORDER

People of MI v John Henry Adams, Jr.

Docket No. 208313

LC No. 97 004255

Helene N. White
Presiding Judge
Myron H. Wahls
Robert P. Young, Jr.
Judges

The Court orders, pursuant to MCR 7.205(D)(2), that the October 30, 1997 order of the Recorder's Court for the City of Detroit in this cause, to the extent requiring revelation of the identity as well as production of an unwitting witness, is REVERSED, AND THE CAUSE IS REMANDED to the Wayne Circuit Court for further proceedings consistent with this order. Disclosure of identity and production of this witness is sought in aid of a challenge to the validity of the search warrant in this case. Such a challenge to the warrant would require defendant to establish that material false information was included in the search warrant affidavit, with the knowledge of the affiant police officer, and that without such false material, there was an insufficient showing of probable cause to justify issuance of the warrant. *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). Here, however, the

search warrant affidavit reveals, on its face, that neither the credibility of the confidential informant nor that of the unwitting witness was relevant or essential to establishing probable cause. The informant was searched for money and drugs, then placed under surveillance, and observed to meet with the unwitting witness, then to contact defendant, whereupon defendant entered his place of business, emerged, handed an object to the unwitting witness and received something in exchange, and the unwitting witness then handed the object received from defendant to the informant, who turned it over to the affiant police officer at the conclusion of the surveillance. That object was found to contain heroin. Probable cause was thus based on the observations made by the police officer, the verisimilitude of which can be challenged, or not, without any need for disclosure of either the confidential informant's identity or the identity of an unwitting witness who might be able to supply information which would permit identification of the confidential informant. *Zaroogian v United States*, 367 F2d 959 (CA 1, 1966); *People v Poindexter*, 90 Mich App 599, 609, 282 NW2d 484 (1979). The trial court may reconsider the matter is the prosection seeks to use evidence related to the incident at trial.

We do not retain jurisdiction.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

June 17, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v John Henry Adams, Jr.

Docket No. 208313

LC No. 97 004255

Helene N. White
Presiding Judge
Myron H. Wahls
Robert P. Young, Jr.
Judges

The Court orders that the motion for rehearing of order is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

Dec. 10, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

Michigan Supreme Court

ORDER

Entered: March 30, 1999

People of Michigan,
Plaintiff-Appellee,

v

SC: 113794
COA: 208313
Rec Ct: 97-00455

John Henry Adams, Jr.,
Defendant-Appellant.

Elizabeth A. Weaver, *Chief Justice*
James H. Brickley, Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., *Justices*

On Order of the Court, the application for leave to appeal from the June 17, 1998 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the question presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any subsequent review by the Court of Appeals.

Young, Jr., J., not participating.

I, CORBIN, R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 30, 1999 — Date

/s/ Corbin R. Davis — Chief Clerk

STATE OF MICHIGAN

SS **SEARCH WARRANT**

COUNTY OF WAYNE

TO THE SHERIFF OR ANY POLICE OFFICER OF SAID COUNTY: Sergeant Arthur McNamara, affiant, having subscribed and sworn to an affidavit for a search warrant, and I having under oath examined affiant, am satisfied that probable cause exist:

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:

The entire premises know as **14540 Puritan**, located in the City of Detroit, County of Wane, State of Michigan. The business if name the "Classic Auto Repair", located on the northwest corner of Puritan and Hubbell. The structure is a two (2) bay auto repair shop with attached office area, white painted brick.

The entire premises known as **18295 Lindsay**, located in the City of Detroit, County of Wayne, State of Michigan. The premises is described as a single family, one (1) story, brick bungalow, located on the west side of Lindsay three houses south of Pickford.

Also to be searched:
#1 John Henry Adams Jr., black, male, DOB 9-21-45, described as 5'-11", 190 pounds, medium complexion, salt and pepper full set of hair.

The search is to include the entire premises, curtilage, all out buildings, garages or other storage buildings related to the above described premises, all containers in or on the premises and curtilage or related to the above described premises. Also, all vehicles on the curtlidge related to John Henry Adams and/or Carol Ann Briglen and/or any vehicle utilized in the everyday business of Classic Auto Repair, which includes tow trucks, and business vans, and to seize, secure, tabulate and make return according to law the following property and things:

All suspected controlled substances, especially cocaine, heroin, and marijuana, all items used in connection with the sales, manufacture, use, storage, distribution, transportation, delivery, and/or concealment of controlled substances. All equipment and supplies used in the use, manufacture, delivery, and sale of controlled substances. All controlled substance paraphernalia, the means and instrumentalities utilized in the possession, dilution, packaging, plastic bags, manila envelopes, strainers, measuring spoons, scales, grinders, weights, etc. All evidence of narcotics and controlled substances, use transportation, possession, or

distribution including records, papers, tally sheets, ledgers, digital display pagers, digital beepers, telephone numbers of customers, suppliers, couriers, other papers reflecting narcotics and controlled substance distribution or transportation, of narcotics or controlled substances. All telephone answering machine recordings or videos reflecting narcotic trafficking. All monies (or other assets), books, and records used in connection with illegal narcotic trafficking or the hiding of proceeds from illegal narcotic trafficking. All pre-recorded funds used to make purchases of controlled substances and any item obtained through the sales of controlled substances. All proceeds of said narcotic distribution or evidence of conversion or said proceeds such as records, the use of nominees, bank accounts, wire records, any keys, any credit card receipts, rental car receipts, gasoline receipts, airplane tickets, passports, telephone toll or photo of video tapes of conspirators, photographs of any conveyances and locations of controlled substances. Titles for all vehicles and registrations thereto, records, reflecting residence, and all firearms and ammunition, incendiary or explosive devices used in connection with the above described activities. All evidence of ownership, occupancy, records reflecting residence, possession or control of the above described place.

The affiant is currently a member of the Detroit Police Department assigned to the Narcotics Division. The

affiant has been a member for the past twenty four (24) years, with the endmost ten (10) years experienced in narcotics investigations. The affiant has received specialized training in various aspects of drug law enforcement and drug related asset investigations, including the identification, locating, seizure and forfeiture of proceeds derived from violations of State and Federal narcotics laws. The affiant has personally been involved in numerous drug investigations both as a uniform and in an uncover capacity. The affiant has attended numerous schools and seminars dealing with the use, sale, manufacture, identification and distribution of controlled substances.

The affiant is working in conjunction with a credible and reliable source of information. The source of information has been utilized on more than three occasions, resulting in more than three arrests for Violations of the Controlled Substance Act, with more than three convictions in Recorders Court and other jurisdictions. The affiant has verified information supplied by this source of information through an independent investigation and found that the information is true and accurate. This informant is responsible for the recovering substantial amounts of cocaine, heroin, stolen vehicles, and counterfeit United States Currency from various narcotic traffickers. The informant has purchased cocaine and heroin in the past and can detect these substances by sight.

On March 19, 1997, the affiant met with the informant to discuss the narcotic trafficking of Jon Adams at 14540 Puritan. The informant stated that John Adams is the owner of "Classic Auto Repair" and that he resides on Lindsay with his girlfriend. The informant further stated that John Adams does not store any proceeds at 14540 Puritan but every night will take all the proceeds for that day to his residence on Lindsay Street.

On March 19, 1997, the affiant searched the informant for money and drugs with none being found. The informant and an unwitting were then followed to 14540 Puritan the Classic Auto Repair. Officers set up surveillance and observed the unwitting approached John Adams in the front of the business. The unwitting and the informant waited outside while John Adams went into the business and appeared to have retrieved something from the office area. John Adams then handed this small object to the unwitting who pocket it and left the area with the informant.

The affiant then met the informant to discuss the facts surrounding the narcotic transaction. The informant stated that John Adams gave the unwitting a packet of heroin and in turn the unwitting handed the packet of heroin to him/her (the informant). The informant stated that he/she maintain control of the heroin until it was turned over to the affiant. The affiant received the heroin from the informant and the informant was again searched for money and drugs

with none being found. The informant was released. The packet of heroin was then conveyed to the Narcotics Division where a preliminary test was conducted and found that it was positive for the presence of heroin. The remaining specimen of heroin was place into LSF 421731.

On March 19, 1997, officers maintained surveillance of John Adams prior to the informant and unwitting arriving at 14540 Puritan and until John Adams arrived home at 18295 Lindsay. During this surveillance officers observed several different persons arrive and park some distance away from the business and walk up. The affiant observed these persons engage in conversation with John Adams and again John Adams would go into the office area and retrieve a small object. On at least two occasions the affiant observed these costumers hand John Adams an unknown amount of United States currency.

Due the fact that the informant stated that John Adams keeps his narcotic proceeds on Linday Street, the affiant and other officers conducted a moving surveillance of John Adams. On March 19, 1997, at approximately 10:30 p.m. the affiant observed John Adams lock up Classic Auto Repair and was carrying several brown paper bags. John Adams then entered a 1987 Dodge van 1997 Michigan plat MKK595 and was followed to 18295 Lindsay where he entered utilizing a key. John Adams had taken the brown paper bags into the residence. Therefore, this writer

believes that John Adams had taken in the narcotic proceeds for the day into 18295 Lindsay as stated by the informant.

The affiant has been involved in several hundred search warrant raids in the past. It is the affiants' experience that narcotic traffickers commonly maintain weaponry in their residences or in their possession. These firearms ar used to protect the narcotic traffickers, the narcotics proceeds, and the narcotics themselves.

Wherefore, the affiant has probable cause to believe that the above captioned items will be found inside the premises of 14540 Puritan and 18295 Lindsay, in the City of Detroit, County of Wayne, State of Michigan.

SUBSCRIBED AND SWORN TO BEFORE ME AND ISSUED UNDER MY HAND THIS 20th of March 1997.

AFFIDAVIT:
/s/ Sgt. A. McNamara

APPROVED:
/s/ J. C. Rebtit
ASST PROSECUTING ATY

/s/ Irene J. Craig
MAGISTRATE JUDGE
of 36th District Court
Wayne Co., MI